

(2015) 10 DEL CK 0120
In the Delhi High Court
Case No : W.P. (C) No. 766/2012

Rupesh Kakkad

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 28-10-2015

Acts Referred:

Cantonments Act, 1924 — Section 112
Government Grants Act, 1895 — Section 2
Transfer of Property Act, 1882 — Section 108

Citation : (2015) 10 DEL CK 0120

Hon'ble Judges : Rajiv Sahai Endlaw, J.

Bench : Single Bench

Advocate : Asuthosh Lohia, Soumya Kumar and Sagar Chauhan, Advocates, for the Appellant; Akshay Makhija, CGSC, Mahima Bahl, Sanju Geeta and Siddharth Thakur, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—The petition impugns the order dated 29th December, 2011 of the respondents Union of India (UOI), Joint Secretary (C&W), Defence Finance and Defence Estate Officer Cantonment Board rejecting the request of the petitioner for mutation of property, being leasehold plot of GLR Survey No. 73/2, Varanasi Cantonment, to the name of the petitioner. Axiomatically, a mandamus is sought for mutation in the name of the petitioner.

2. The petition was entertained and the respondents have filed a counter affidavit to which a rejoinder has been filed by the petitioner. The petitioner, in compliance of the order dated 1st April, 2013 in this proceeding, has filed an additional affidavit and to which a response has been filed by the respondent. The respondent has filed yet another supplementary affidavit in pursuance to the order dated 26th November, 2014 in this proceeding. The petitioner is stated to have filed a response to the said supplementary affidavit of the respondents but which is not on record. The counsel for the petitioner states that he is not

pressing for the same to be considered. The counsels have been heard.

3. The position which emerges is as under:-

A. The land ad measuring 1.20 acres (52,272 sq. ft.) bearing GLR Survey No. 73/2 Varanasi Cantonment was initially leased to Shri Gurucharan Prasad and Shri Jagannath Prasad w.e.f. 11th January, 1932.

B. The leasehold rights in the aforesaid land were transferred to the exclusive name of Shri Jagannath Prasad in pursuance to a Partition Deed dated 24th August, 1948 between the said Shri Gurucharan Prasad and Shri Jagannath Prasad and a Supplementary Deed dated 15th July, 1949 was executed.

C. Pursuant to the user of the land being allowed to be changed, another Supplementary Deed dated 14th May, 1963 was executed.

D. Shri Jagannath Prasad died on 3rd August, 1973 and the leasehold rights in the land aforesaid were inherited by his sons Shri K.P. Saigal and Shri Shamboo Prasad Saigal and the leasehold rights were mutated from the name of Shri Jagannath Prasad to the name of his said sons.

E. Shri K.P. Saigal and Shri Shamboo Prasad Saigal, vide Sale Deed dated 19th November, 1998 transferred leasehold rights in respect of 17,008 sq. ft. out of the aforesaid land to Shri Rajendra Kakkad, Sh. Illesh Kakkad, Sh. Rupesh Kakkad (petitioner herein) and Sh. Nilesh Kakkad.

F. The aforesaid Sh. K.P. Saigal and Sh. Shamboo Prasad Saigal vide Sale Deed dated 8th December, 2000 transferred the leasehold rights in another 14,260 sq. ft. in favour of the petitioner herein.

G. In this manner, Sh. K.P. Saigal and Sh. Shamboo Prasad Saigal retained only 21,004 sq. ft. out of total leasehold land ad measuring 52,272 sq. ft.

H. The petitioner applied for mutation in his name of leasehold rights with respect to the aforesaid 14,260 sq. ft.

I. The said application was rejected vide order dated 31st January, 2011.

J. The petitioner filed W.P.(C) No. 1773/2011 in this Court impugning the aforesaid rejection.

K. This Court vide order dated 26th May, 2011 in the aforesaid writ petition set aside the order dated 31st January, 2011 and remanded the matter to the respondents for consideration afresh.

L. The respondents, vide impugned order dated 29th December, 2011, after reconsidering the matter have again rejected the application of the petitioner for mutation. The reason therefor, as borne out from paras 7 & 8 of the impugned order, is as under:-

"7. The matter has since been re-examined in compliance of the order dated

26.05.2011 of the Hon"ble High Court in WP 1773/2011. After careful consideration of the records of the case, opinions of Director General of Defence Estates, Army Headquarters, Defence (Finance) and Legal Advisor (Defence), it is observed that sub- division of the property in favour of the petitioner and other purchasers would amount to creation of fresh leases. Disposal of fresh leases is governed by Rule 16 of CLAR, 1937. The Rule provides that an initial premium shall be charged on the lease and the lease shall be put up to public auction for sale to the person who agrees to pay the highest amount as premium. In the instant case since the due procedure of charging initial premium through public auction is not getting followed, there is violation of Rule 16 of the CLA Rules, 1937. It is also observed that the premium which was due to the Government was taken by the lessee while transferring leasehold rights through sale deeds. Therefore mutation of property in favour of petitioner would result in heavy revenue loss to Government. It is also held that regularizing sub- division of the property located outside civil area is bound to become precedence for similar requests seeking regularization of sub-divisions in all 62 Cantonments which would result in proliferation of colonization of Cantonments thus affecting the overall security environment.

8. In view of the above, the request of the petitioner for mutation of the property cannot be acceded to."

(Emphasis added)

4. On enquiry, it is informed that a separate application for mutation was filed by the petitioner along with Shri Rajendra Kakkad, Sh. Illesh Kakkad and Sh. Nilesh Kakkad with respect to 17,008 sq. ft. of land but the same is still pending consideration.

5. On further enquiry, it is informed that the Lease Deed dated 11th January, 1932 has been extended from time to time and is now valid till the year 2022.

6. The counsel for the petitioner has placed only the copy of the original Lease Deed dated 11th January, 1932 before this Court and has not placed the supplementary lease deeds aforesaid executed and / or the documents executed for extension of the lease till 2022. However a perusal of the order sheet shows that the original lease deed dated 11th January, 1932 was directed to be brought before this Court and was perused by this Court as is borne out from the order dated 1st April, 2013.

7. On a reading of the impugned order what emerges is that the reason for refusal of mutation is, that the same would amount to sub-division of leasehold and which is not permissible. It has as such been straightaway enquired from the counsel for the petitioner whether under the Lease Deed, transfer of part of the land amounting to sub-division of the leasehold land is permissible.

8. The counsel for the petitioner, though is unable to show any clause in the lease deed permitting transfer by the lessee of a part of the leasehold property

and obliging the lessor to, upon such transfer, grant a separate lease deed of the said part, however contends that since the lease deed, vide Clause 1(8) thereof permits the lessee to sub-lease the property, the sub-lease could be either of the entire leasehold property or of a part thereof and the use of the word "sub-lease" indicates that if the lessee creates a sub-lease of part of the property, the sub-lessee of the said part would be entitled to have a separate lease deed executed from the lessor in his / her favour. It is further contended that since the lessees i.e. Shri K.P. Saigal and Shri Shamboo Prasad Saigal, under the Lease Deed are permitted to sub-lease the leasehold premises, the permission for sub-division stood given. On further enquiry, it is informed that there is no other provision or rule permitting the sub-division of leasehold premises.

9. I am afraid, the counsel for petitioner is confusing "sub-lease" with "sub-division," when the two are entirely different. The original lessees were not granted ownership rights in the land but only leasehold rights in the land. A power to sub-lease would be a power to further lease out the leasehold. The same would however not entitle the lessees to sub-divide the property and to grant sub-lease of different portions of the sub-divided property to different persons.

10. I have in this regard also considered whether there is any inherent right in a lessee to sub-divide. The same, subject to the contract to the contrary, is to be found in Section 108(B) of the Transfer of Property Act, 1882 which vests a right in the lessee to transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property. Therefrom also, the distinction between sub-lease and sub-division is borne out. If sub-lease was to cover sub-division, the need for the words "whole or any part of his interest in the property" would not have arisen.

11. However the lease is found to have been granted in favour of the aforesaid Shri Gurucharan Prasad and Shri Jagannath Prasad by a Lease Deed executed between them and the Secretary of State for India in Council. The recital of the said lease records that the Cantonment Authority of Banaras had executed the said lease deed on behalf of the Secretary of State, with the conformation of the Government of India. The question would arise whether the said lease would be a Government Grant in as much as if it is a Government Grant, as per Section 2 of the Government Grants Act, 1895, the provisions of the Transfer of Property Act would not be applicable thereto. Thus, even if there were to be no prohibition in the lease deed against a sub-division, in the absence of any clause permitting sub-division, the lessee would still not have a right to sub-divide in as much as a Government Grant is to be read as per its own terms.

12. Upon the same being put to the counsel for the petitioner, he invited attention to Section 112 of the Cantonment Act, 1924 which only provides that every Board i.e. Cantonment Board shall be competent to enter into and perform any contract necessary for the purposes of that Act. I am unable to see as to how the said provision would take away the character as is evident on the face of

the subject lease, of the same being a Government Grant, from that of being a Government Grant. Once that is so, the question of applicability of Section 108 of the Transfer of Property Act would not arise.

13. A similar question has often arisen in the city of Delhi in relation to the leases granted by the Land & Development Office (L&DO) and the Delhi Development Authority (DDA) and where the consistent view is that no sub-division of the lease, which has an impact of changing the layout plan, affecting the density and FAR available for construction, can be permitted under a lease deed, save if permitted by the lessor i.e. L&DO or the DDA.

14. The counsel for the petitioner has then argued that the reasoning given in the impugned order, of sub-division amounting to a fresh lease deed, is incorrect.

15. Once it is found that sub-division of the leasehold is not permitted, and on which ground the mutation has been refused, the language used in the impugned order does not make any difference. The authority concerned, in the impugned order, has reasoned that allowing sub-division which is not permitted would tantamount to grant of a fresh lease and which cannot be done without auction. It cannot be said that the said reasoning is also de hors of any merit. Once it is found that the right which the petitioner is claiming is not borne out from the original lease, the creation of new rights would undoubtedly amount to a new lease and which as per the consistent dictum of the Supreme Court in *Netai Bag and Others Vs. The State of West Bengal and Others*, , *Shri Sachidanand Pandey and Another Vs. The State of West Bengal and Others*, and *Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation*, with respect to disposal of properties of the State can now be done only by way of an auction.

16. No other argument has been raised.

17. Accordingly, the order dismissing the petition was dictated in open Court.

18. However while correcting the order in the Chamber and going through the file I found Clause 1(8) of the Lease Deed dated 11th January, 1932 to be as under:-

"1. And the lessees doth hereby covenant with the Secretary of State -

(8) *(xxx xxxxxx upon every assignment transfer or sub-lease of the premises hereby demised or any part thereof or within one calendar month thereafter to deliver a notice of such assignment transfer or sub-lease to the Military Estates Officer setting forth the names and description of the parties to every such assignment transfer or sub-lease and the particulars and effect thereof.

* The portion within brackets to be inserted if application*

(Emphasis added)

Therefrom it appeared that the lease permits the lessee to assign, transfer or sub-lease either the entire leased premises "or any part thereof" and which the counsel for the petitioner had failed to point out. Though the said clause was referred to in the hearing and also perused in the Court but the words "or any part thereof" therein escaped attention, perhaps owing to the dim copy thereof annexed to the petition.

19. Accordingly, the counsels were telephonically contacted and asked to appear the next day. In response thereof the counsel for the petitioner did not appear himself and sent his colleague but without any instructions. The counsel for the respondents appeared and agreed that vide clause aforesaid of the lease deed, assignment, transfer or sub-lease of part of the leased premises is permitted. He however contended that the same would also not entitle the transferee, assignee or sub-lessee of the part of the leased premises to an independent lease of that part from the lessor i.e. the respondents. It was stated that the same would at best entitle the transferee, assignee or sub- lessee of a part to have his name added to the name of the lessee.

20. There is still nothing before me to show that the petitioner is entitled to mutation exclusively in his favour of only that part of the leasehold which has been transferred to him. The petitioner, as aforesaid, can only have his name added to that of the existing lessee in the records of the respondents.

21. However in this context, another argument of the counsel for the respondents, of the lessee having not given intimation of transfer within the time prescribed in Clause 1(8) of one calendar month becomes relevant.

22. I however find that the respondents, while rejecting the application of the petitioner, have not given the said ground. It is thus not deemed necessary at this stage to adjudicate whether the said time of one month prescribed for intimating of assignment/transfer is of essence or not. Suffice it is to state that no consequences, of violation thereof, are found to have been prescribed in the lease deed.

23. The petition is accordingly allowed to the extent that subject to the petitioner complying with the necessary formalities in this regard within a period of three months from today, the respondents are directed to add the name of the petitioner along with the names of the existing lessee with respect to the lease aforesaid but on the condition that the petitioner thereby would not become entitled to physical partition of the leasehold and the respondents would be entitled to treat the entire leasehold as one only for all purposes whatsoever.

No costs.